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No. 82-230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WAYNE C. POMANOWSKI,

Petitioner,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, a New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; CHARLES DARRAH,

Respondents.

Brief and Appendix on Behalf of Respondents Monmouth County Board of Realtors and Monmouth County Multiple Listing Service in Opposition to Petition for Certiorari to the Supreme Court of New Jersey

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QUESTIONS PRESENTED

1. Does the New Jersey Supreme Court's interpretation of the New Jersey Antitrust Act raise a federal question giving the United States Supreme Court jurisdiction pursuant to 28 U.S.C. 1257(3)?

2. May petitioner assert before this Court a claim under the Commerce Clause of the United States Constitution when that claim was neither raised nor considered below?

3. May petitioner assert a federal Constitutional "right of nonassociation" when that claim was neither raised nor considered below?

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I

COUNTERSTATEMENT OF FACTS

This case arises out of a decision by the New Jersey Supreme Court construing the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 *et seq.* The specific issue raised in the New Jersey state courts was whether respondent trade association[1] may, without violating the New Jersey statute, limit participation in its multiple listing service[2] to association members, where membership is readily available to all licensed real estate brokers. Petitioner Pomanowski had been a member of the association and a participant in the listing service, but he voluntarily terminated his membership and thereby automatically surrendered his eligibility to participate in the service. Although it has always been open to him to reinstate his membership, he chose instead to challenge the membership rule under the New Jersey statute. In the decision below[3] the Supreme Court of New Jersey endorsed the reasonableness of the membership requirement and held that it did not violate the state Act. Petitioner now asks

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1. The Monmouth County Board of Realtors ("MCBR").

2. The Monmouth County Multiple Listing Service ("MCMLS"). Functioning as a committee of the MCBR, the MCMLS serves to make a broad range of property listings and listing information available to those MCBR members who participate in the service. Thus, a broker-participant in the MCMLS may enter into an agreement with a property owner whereby the owner retains the broker as his agent to list the property for sale or exchange. The broker may then submit that listing to the MCMLS, which in turn disseminates it to other participating brokers who are, in effect, solicited by the listing broker to act as sub-agents to sell or exchange the property. If an MCMLS participant thereafter brings about a sale or exchange of the property, the listing and selling brokers divide the brokerage commission on terms agreed upon between themselves.

3. 89 N.J. 306, 446 A.2d 83 (1982), reproduced at petitioner's appendix ("P.A.") 1 to 31.

this Court to grant certiorari of the case, alleging for the first time the existence of federal questions.

The balance of the pertinent facts are set forth in detail in the decision of the New Jersey Supreme Court and need not be repeated here.

ARGUMENT

Point I

This Court lacks jurisdiction to review the New Jersey Supreme Court's interpretation of the New Jersey Antitrust Act because there is no federal question present.

In Point II of the certiorari Petition it is argued that the Supreme Court of the United States has jurisdiction of this matter for the purpose of "giving direction" to the New Jersey Supreme Court concerning the correct application of "prevailing federal opinions" on the antitrust question decided by the state court. Petition, p. 15. Several interrelated arguments are advanced in support of this contention.

Petitioner suggests initially that in reaching its decision the New Jersey Supreme Court "deemed" a federal question to be before it and that it decided that question adversely to the federal right being asserted, with the result that this Court has jurisdiction under *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) and *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Petition, p. 17.

Orr and *Prouse* were both cases in which the state courts expressly decided questions of federal law. Those cases therefore lack even colorable application to the present matter: the New Jersey Supreme Court did not anywhere intimate in its opinion that it considered a federal question to be before it, or that it was in fact undertaking to decide a federal question. Rather, the opening paragraph of its opinion states the issue to be "whether [the membership requirement here in issue] constitutes a violation of the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1 to -19" (P.A. 1 to 2). To be sure, in Section II of the opinion the court recognized that federal decisions under the Sherman Act constitute "aids in

the determination of the antitrust implications of [business arrangements such as those here in question] in the light of our relatively new Antitrust Act, *N.J.S.A.* 56:9-1 to -19." (P.A. 8), and it went on to say (P.A. 9 to 10) that the federal cases and other state court cases "are useful in developing an analytical framework" within which to decide the state-law question of compliance with the New Jersey Antitrust Act. Its decision of the case, however, was cast unequivocally as one of state rather than federal law:

> [W]e conclude that in conditioning MCMLS access on MCBR membership, defendants have created a reasonable restraint of trade—one not in violation of *our* Antitrust Act.

P.A. 28 (emphasis added).

Thus, the organization and language of the opinion of the New Jersey Supreme Court show plainly that it was basing its conclusion *solely* upon state law. Under those circumstances, this Court lacks jurisdiction to review the New Jersey Supreme Court's determination. 28 U.S.C. 1257(3); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439 (1965).

Petitioner attempts to avoid the New Jersey Supreme Court's express and exclusive reliance upon the New Jersey Act by invoking *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) for the idea that "where a state court is guided by Federal interpretation of parallel Federal laws in interpreting its own state law and [the state court] fails to understand such Federal consideration," the Supreme Court of the United States has jurisdiction "to correct" the state court. Petition, pp. 19 to 20.

Petitioner has misstated the principle which underlay the *Zacchini* decision. That case and others like it[4] stand for the proposition that where a state court construing a state law or constitutional provision acts under a perceived compulsion of federal law but misinterprets the federal rule, this Court may exercise jurisdiction, declare the true state of the federal law, and remand the matter in order that the state court may be relieved of the compulsion and proceed to decide the issue solely as a matter of local law.

In *Zacchini* itself an entertainer sued a broadcasting company for damages arising out of the unauthorized videotaping and subsequent public broadcasting of petitioner's "human cannonball" act. The Ohio Supreme Court gave judgment for the broadcasting company upon a finding that its use of the videotape was privileged under the First and Fourteenth Amendments of the United States Constitution, *see* 433 U.S. at 565-66.

The Supreme Court of the United States held that the decision of the Ohio Supreme Court was based solely on federal grounds, 433 U.S. at 568. The Court went on to say, however, that even if the decision of the state court were understood as ultimately resting on Ohio law,

> it appears that at the very least the Ohio court felt *compelled* by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amend-

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4. *See, e.g., United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-631, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973); *State Tax Commission v. Van Cott*, 306 U.S. 511, 514-515, 59 S.Ct. 605, 83 L.Ed. 950 (1939); and *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924).

> ments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law. If the Supreme Court of Ohio "held as it did because it felt under *compulsion* of Federal law as enunciated by this Court so to hold, it should be relieved of that *compulsion*. It should be freed to decide . . . these suits according to its own local law." *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5, 71 S.Ct. 1, 95 L.Ed. 3 (1950).

433 U.S. at 568 (citation omitted; emphasis added).

Similarly, in *State Tax Commission of Utah v. Van Cott*, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950 (1939), this Court undertook to review a decision of the Utah Supreme Court because the state court's "opinion as a whole shows that the court felt *constrained* to conclude as it did because of the Federal Constitution and this Court's prior adjudications of constitutional immunity," 306 U.S. at 514 (emphasis added). In *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924), the Court premised its *certiorari* jurisdiction upon the determination that the New York court had reached a certain state-law conclusion "because it thought the federal Constitution *required* such action." 264 U.S. at 120 (emphasis added). And in *United Airlines v. Mahin*, 410 U.S. 623, 93 S.Ct. 1186, 35 L.Ed.2d 545 (1973), jurisdiction was based upon the fact that two justices of the Illinois Supreme Court—justices possessed of the "swing" votes—had considered themselves bound by the federal Constitution and by a decision of the Supreme Court of the United States to reach a given result with respect to a state taxation question. 410 U.S. at 630-31.[5]

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5. *Cf. St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S.Ct. 2142, 68 L.Ed.2d 612 (1981), a decision which is something of a hybrid between *Orr v. Orr*, *supra*, and *Zacchini v. Scripps-Howard Broadcasting Co.*, *supra*. The case had to do with

The state-court decision in the case at bar stands in stark contrast to *Zacchini* and the other cases discussed *supra*. There is no suggestion in the opinion of the New Jersey Supreme Court that it felt itself "compelled" by federal legislation or federal court decisions to reach the conclusion it did on the merits of this matter. Instead, it plainly appears that that court relied upon federal antitrust cases only for the limited purpose of "developing an analytical framework" within which to address, as a matter of state law, the antitrust question before it. P.A.9. To that end, it employed *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), and other

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the imposition of unemployment compensation taxes under the Federal Unemployment Tax Act (FUTA) and South Dakota's complementary tax statute.

According to the opinions of this Court and of the South Dakota Supreme Court, FUTA permitted credits against the federal unemployment tax for employers who had paid money into federally approved state unemployment tax funds. In order for a state to participate in the federal plan it had to meet certain requirements set out in FUTA.

The plaintiffs were exempt from the federal tax by virtue of their status as charitable organizations. Other provisions of FUTA, however, required participating states to tax certain charitable organizations exempted from the direct federal tax. The central issue presented by the case was whether plaintiffs were exempt, under yet other sections of the South Dakota statute and its federal analog, from that federally-mandated but state-imposed tax upon charitable organizations. *See St. Martin Lutheran Church v. South Dakota*, *supra*, 451 U.S. at 775-77; and *Matter of Northwestern Lutheran Academy*, 290 N.W.2d 845, 846-47 (S.Dak. S.Ct., 1980).

Just as it had done in *Orr v. Orr*, *supra*, this Court found jurisdiction to review the South Dakota Supreme Court's denial of the exemption in the fact that the state court had based its conclusion entirely upon federal law, and not upon any independent and adequate state ground. 451 U.S. at 780, fn.9. With a further reference to *Zacchini* and its predecessors, the Court also undertook to free the state court thereafter to interpret its own law as it saw fit, unfettered by any perceived federal compulsion to reach a given result. *Id.*

landmark federal (and New Jersey[6]) decisions to establish the basic parameters of a "rule of reason" analysis. Its application of those parameters to the facts of the case, however, was not in any sense dictated or compelled by federal decisions arising in the same (or even a similar) context as the one before the court. On the contrary, the New Jersey Supreme Court pointedly refused to base its decision upon several federal decisions cited by respondent MCBR,[7] and it chose instead (P.A. 22 to 28) to rest its determination upon prior state-law rulings arising in New Jersey (*Grillo v. Board of Realtors of Plainfield Area*, 91 N.J. Super. 202, 219 A.2d 635 (Ch. Div. 1966) and *Oates v. Eastern Bergen County Multiple Listing Service, Inc.*, 113 N.J. Super. 371, 273 A.2d 795 (Ch. Div. 1971)); in Illinois (*Blake v. H-F Group Multiple Listing Service*, 36 Ill.App. 3d 730, 345 N.E.2d 18 (App. Ct. 1976)); in Maryland (*Grempler v. Multiple Listing Bureau, Inc.*, 258 Md. 419, 266 A.2d 1, 45 A.L.R.3d 180 (Ct. App. 1970)); in Pennsylvania (*Collins v. Main Line Board of Realtors*, 452 Pa. 342, 304 A.2d 493 (Sup. Ct.), *cert. den.* 414 U.S. 979 (1973)); in California (*Marin County Board of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 130 Cal. Rptr. 1, 54 P.2d 833 (1976)); and in Iowa (*State v. Cedar Rapids Board of Realtors*, 300 N.W.2d 127 (Iowa S.Ct. 1981)).

In the absence of a perceived federal compulsion, there exists no basis here for the exercise of federal question jurisdiction under *Zacchini* or any of the other decisions by this Court. Petitioner cannot alter this result by

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6. *State v. Lawn King, Inc.*, 84 N.J. 179, 417 A.2d 1025 (1980).

7. *Brown v. Indianapolis Board of Realtors*, 1977-1 Trade Cases, para. 61,435 p. 71,611 (S.D. Ind. 1977), *Martin-Trigona v. National Association of Realtors, et al.*, 1978-1 Trade Cases, para. 61,915 p. 73,872 (E.D. Ill. 1978), and *Murphy et al. v. Alpha Realty, Inc., et al.*, 1978-2 Trade Cases, para. 62,388 (N.D. Ill. 1978).

pointing, at pp. 15 through 19 of his Petition, to the fact that the New Jersey Antitrust Act includes a provision (*N.J.S.* 56:9-18) which states that the statute "shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practical, a uniformity in the laws of those states which enact it." The proper construction of that language is itself a question of state law, to be decided exclusively by the state court, and no federal question is raised by the mere presence of that provision in the state enactment. *Miller's Executors v. Swann*, 150 U.S. 132, 14 S.Ct. 52, 37 L.Ed. 1028 (1893).

In the present case the New Jersey Supreme Court undertook to construe, as a matter of state law, the "ruling judicial interpretations" language contained in the New Jersey Act. *See* P.A. 8 to 10. The court made it clear that it did not regard the quoted phrase as a general mandate to defer to federal court decisions addressing even substantially identical facts under the Sherman Act: the court expressly declined (at P.A. 9) to treat as "ruling judicial interpretations" several federal district court opinions cited by the MCBR which were squarely on point,[8] and it found no occasion to consider whether it would be bound even by a decision of the Supreme Court of the United States, P.A. 8 to 9. Thus, it characterized federal decisions as nothing more than "persuasive authority" (P.A. 8, *quoting* its own opinion in *State v. Lawn King, supra*) and a "respected source of instruction," P.A. 9, f.n. 3. Those descriptions fall well short of establishing federal-question jurisdiction under 28 U.S.C. 1257 (3), *Minnesota v. National Tea Co.*, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 920 (1940), *State Tax Commission of Utah v. Van Cott*, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950 (1939), and this Petition for Certiorari should therefore be denied.

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8. See cases cited at f.n. 17, *supra*.

Point II

Petitioner may not assert his Commerce Clause argument here because it was neither raised nor considered below.

Point I of the Petition seeks to state a claim under the Commerce Clause of the United States Constitution, Art. I, Sec. 8, para. 3. Nowhere in the Petition, however, has any attempt been made to comply in connection with that claim with the requirements of Supreme Court Rule 21.1(h). That rule provides in pertinent part:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The effort at compliance with Rule has not been made because compliance is impossible: in the state courts this case was pleaded, tried, briefed, argued, and decided solely under the New Jersey Antitrust Act, and at no time prior to the filing of the Petition was it so much as hinted that petitioner wished to assert a claim under the Commerce Clause.[9]

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9. *See* petitioner's Amended Verified Complaint (R.A. 1 to 7), petitioner's Pretrial Memorandum submitted below (R.A. 8 to 11); and tables of contents from petitioner's trial brief (R.A. 30 to 32) and brief on appeal below (R.A. 37 to 40). And because the interstate-commerce question was never raised by petitioner in the state-court

Petitioner seeks belatedly to inject the interstate commerce issue at this point by including in his Petition asserted "facts" which are not contained in the record below. For example, he states at page 12 of the Petition (and again at page 21) that the Realtor organization "controls and precludes" non-Realtors in 27 of a total of 35 multiple listing services which he says operate in the State of New Jersey. He includes no record citation for this statement, nor could he: there was no proof at trial even of the total number of multiple listing services functioning in the state, much less of facts which would support petitioner's opinion that non-Realtors are "controlled and precluded" in a large number of such services.

Similarly, petitioner invokes in aid of his interstate commerce claim the spectre of a "nationwide plan" on the part of the Realtor organization "to exclude all non trade association members from intrastate and interstate commerce," page 12 of Petition. Again, no record citation is offered, for the simple reason that this proposition was not even touched upon at trial.

In addition to improper factual recitals, petitioner attempts to legitimize his Commerce Clause argument with *non sequiturs* ("One must inescapably conclude that with 75 percent control[10] of the MLS in the State of New Jersey, interstate commerce is affected," Petition, page 21), and rhetorical questions ("Can one possibly conclude that in all of these transactions within these Realtor controlled MLS not one person sold his house to

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proceedings, neither the opinion of the trial judge (P.A. 32 to 46) nor that of the New Jersey Supreme Court (P.A. 1 to 31) made any reference to that issue.

10. A percentage evidently based upon the non-facts alluded to earlier in the text, concerning alleged Realtor control of 27 multiple listing services out of an alleged total of 35 in the State of New Jersey.

move to another state; not one title company did business in another state; not one bank had multi-state affiliations?" *Id.*)

Finally, petitioner finds proof of interstate commerce in this Court's decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980), wherein (he says) it was "held that real estate brokers are involved in the interstate commerce process." Petition, pp. 20 to 21. In fact, however, *McLain* held no more than that the petitioners had made out a sufficient showing of activity-within-interstate-commerce as to preclude the dismissal, on jurisdictional grounds, of a complaint alleging violations of the Sherman Act. The Court reached this decision only after a detailed review of affidavits and depositions which focused specifically upon the interstate effects of commercial activity in the New Orleans area by the defendant Real Estate Board. 444 U.S. at 236-39. *McLain* did not at all purport to be a final determination on the question whether the respondents there were engaged in interstate commerce or whether their activities had a substantial effect on interstate commerce, since those matters would have to be determined after a full plenary hearing at which both sides might present evidence bearing on those questions. 444 U.S. at 245. In any event, there is nothing in the opinion to suggest that the interstate commerce aspects of the activity of the New Orleans Real Estate Board can be generalized to the real estate industry as a whole, or to the MCBR in particular. In fact, *McLain* affirmatively states that no such general assumption can be made, and that activity-within-interstate-commerce must in each case be pleaded and, if those pleadings be denied, must be proven. 444 U.S. at 242. Thus, *McLain* cannot cure for petitioner his failure to have asserted or to have proved his Commerce Clause arguments in the New Jersey courts.

In short, petitioner is attempting to rely here upon a federal question which was neither raised nor decided below, and which finds no factual support in the record. This Court has steadfastly and emphatically refused to entertain federal questions which are raised *ab initio* in this forum. *Tacon v. State of Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973); *Monks v. New Jersey*, 398 U.S. 71, 89 S.Ct. 1563, 26 L.Ed.2d 54 (1970); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398(1969); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *Lynch v. New York el rel. Pierson*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934); *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 48 S.Ct. 124, 72 L.Ed. 277 (1927). That principle is a salutary one, and it should be applied here to bar petitioner's Commerce Clause claims.

Point III

Petitioner may not assert a constitutional right of "non-association" here because it was neither raised nor considered below.

Point III of the Petition seeks to raise as a federal question the proposition that the business activities of the respondent Board infringed upon an alleged "freedom of nonassociation" guaranteed to petitioner by the First and Fourteenth Amendments of the United States Constitution. Petitioner acknowledges (at pages 22 and 23) that this question was never discussed by the state courts, but he declares that the record will show that he did in fact raise the issue before those tribunals.

Just as was true of his Commerce Clause argument, however, petitioner has made no effort to comply with the requirement of Supreme Court Rule 21.1(h) that he identify precisely where it was in the record below that the federal question was asserted. Again, the reason he

does not make that effort is because compliance is beyond his reach: the question was neither pleaded nor briefed below, it was not the object of any evidence at trial, and it received no mention whatever in the opinions of the trial judge or of the New Jersey Supreme Court.

As is indicated in petitioner's statement of facts, this case was twice the subject of appellate proceedings. The first appeal followed the granting of summary judgment in favor of the petitioner, and resulted in the reversal of that judgment by the Appellate Division of the New Jersey Superior Court and the remanding of the case for a plenary trial. *See* P.A. 47 to 53. During the course of those appellate proceedings the issue of "freedom of non-association" was raised—for the first time—not by petitioner but by an *amicus curiae*, the New Jersey Attorney General. In its remand order the Appellate Division declared that it need not and should not reach that question since it "was not raised or argued below," P.A. 53. The Appellate Division left open the door for the submission of proofs on the issue at trial, however:

> To the extent this alleged right may reflect policy considerations which might affect a rule of reason determination, the trial judge may choose to consider it on the remand.

P.A. 53.

Despite that clear invitation by the appellate court, neither the petitioner nor the *amicus curiae* who had raised the issue in the first place made any effort on remand or on the second appeal to assert this alleged Constitutional right.[11]

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11. *See* the following documents, copies of all of which are reproduced in respondent's appendix: petitioner's Pretrial Memorandum, submitted to trial court in advance of plenary hearing (R.A. 8 to 11); Pretrial Memorandum of *amicus curiae* New Jersey Attorney

Under all of these circumstances, petitioner is foreclosed from asserting this federal Constitutional argument for the first time before the Supreme Court of the United States. *See Cardinale v. Louisiana*, and the numerous additional cases cited in Point II, *supra*.

General (R.A. 12 to 17); Pretrial Order entered by trial judge on December 17, 1979, including factual and legal contentions of all parties and *amici* (R.A. 18 to 29); tables of contents from trial brief submitted by petitioner (R.A. 30 to 32) and the New Jersey Attorney General (R.A. 33 to 26) prior to plenary hearing; and tables of contents from briefs submitted by petitioner (R.A. 37 to 40) and New Jersey Attorney General (R.A. 41 to 44) upon second appeal in the New Jersey courts.

CONCLUSION

For the above reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LAUTMAN, RAPSON,
HENDERSON & MILLS
Attorneys for Respondents,
Monmouth County
Board of Realtors
and Monmouth County Multiple
Listing Service

By: /s/ C. Keith Henderson
C. KEITH HENDERSON

SUPERIOR COURT OF NEW JERSEY

DOCKET No. C 3479-76

WAYNE C. POMANOWSKI,

Plaintiff,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, A New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER, and CHARLES DARRAH,

Defendants.

CIVIL ACTION

AMENDED VERIFIED COMPLAINT

The plaintiff, Wayne C. Pomanowski, residing at Apartment 102D, White Street, Eatontown, Monmouth County, New Jersey, by way of complaint against defendants, says:

1. Plaintiff, Wayne C. Pomanowski, is a real estate broker, licensed as such under the laws of New Jersey, and is engaged in the real estate brokerage business under the name of Thompson Agency, located at 43 Gilbert Street North, Tinton Falls, Monmouth County, New Jersey.

2. Defendant Monmouth County Board of Realtors, hereinafter referred to as Board of Realtors, is a New Jersey Corporation, located at 157 Paterson Avenue, Shrewsbury, Monmouth County, New Jersey. The defendant Board of Realtors is a trade organization comprised of real estate brokers in the Monmouth County area and is one of the largest such county organizations

in the State of New Jersey with more than 260 broker members and more than 1,400 associate members comprised of sales persons. The defendant Board of Realtors is a member of the New Jersey Association of Realtors and the National Association of Realtors.

3. Defendant Monmouth County Multiple Listing Service, hereinafter referred to as M.L.S., is a Committee of defendant Board of Realtors, and located at 157 Paterson Avenue, Shrewsbury, Monmouth County, New Jersey. Its function is to receive listings from its members on real estate located in the Monmouth County area, and to disseminate that listing information to its members. It is primarily a co-operative sales device through which real estate may be merchandised efficiently and expeditiously to the greater advantage of sellers, buyers, and the participating real estate brokers.

4. Defendant William G. Kircher, residing at 70 Salem Lane, Little Silver, Monmouth County, New Jersey, was at all times herein referred to, the Executive Officer for the Monmouth County Board of Realtors and in charge of the M.L.S. William G. Kircher is named as a party defendant in that he, acting either within or without his capacity as Executive Officer, advised plaintiff that plaintiff was no longer a member of the defendant M.L.S. and was no longer entitled to the listings of said defendant M.L.S.

5. Defendant, Charles Darrah, residing at 70 Samara Drive, Shrewsbury, Monmouth County, New Jersey, was at all times herein referred to, President of the Monmouth County Board of Realtors. Charles Darrah is named as a party defendant because he, either acting in his individual capacity or as President of the Board of Realtors, advised plaintiff that plaintiff was not entitled to listings from defendant M.L.S. because plaintiff was no longer a member of defendant Board of Realtors.

6. Plaintiff was a member of the defendant Board of Realtors from approximately July of 1972 to March 31, 1977, at which time he decided to terminate his membership therein by not paying the next year's membership dues for himself and his sales persons in the amount of $250.00. However, plaintiff did wish to continue his membership in defendant M.L.S. and had paid his service fees throughout March 31, 1977 and would continue to pay such fees if allowed to participate in defendant M.L.S.

7. Plaintiff had been a member of defendant M.L.S. from July of 1972. Plaintiff had paid his membership fees in the defendant M.L.S. up to March 31, 1977 and wishes to continue his membership in defendant M.L.S. and is ready, willing, and able to pay his membership and service fees in defendant M.L.S.

8. Beginning on or about April 1, 1977 and continuing to this date, plaintiff has been wrongfully denied listings of available real estate in the Monmouth County area, which are compiled and distributed by defendant M.L.S. because plaintiff's membership in defendant M.L.S. was wrongfully terminated by defendants because plaintiff was no longer a member of the defendant Board of Realtors. Plaintiff was not billed for his membership and service fees in defendant M.L.S. after March 31, 1977. Plaintiff is ready, willing, and able to pay his membership and service fees in defendant M.L.S. and desires to continue such membership.

9. Although plaintiff was an active member and participant of defendant M.L.S. and has paid his membership dues up through March 31, 1977, he was denied listings beginning on or about April 1, 1977, and was advised by defendant Kircher that since plaintiff was no longer a member of the defendant Board of Realtors, then he could no longer be a member of the defendant

M.L.S., even though he was willing to pay his membership fees, and therefore was not entitled to receive listings from the defendant M.L.S.

10. On or about April 1, 1977, defendant Darrah confirmed that plaintiff would not be allowed to receive listings from defendant M.L.S. because plaintiff was not a member of defendant Board of Realtors.

11. Plaintiff is a real estate broker in Monmouth County, and knowledge of listings of available real estate in this area is an integral and necessary element of plaintiff's real estate brokerage business in that knowledge of available property is a real estate broker's stock and trade.

12. Defendant M.L.S. is the only source of real estate listings in the area of Monmouth County in which plaintiff practices his business.

13. The constitution, by-laws, rules, regulations, and/or actions of defendant Board of Realtors and defendant M.L.S. wrongfully deny to plaintiff, as well as real estate brokers and sales persons who are not members of defendant Board of Realtors, access to listings of real estate available in the Monmouth County area which are only available from defendant M.L.S. and are unlawfully in restraint of trade and commerce in this State and violative of the provisions of *N.J.S.A.* 46:9-3 and *N.J.S.A.* 56:9-4.

14. The defendants, by their exclusion of plaintiff, as well as other non-members of the defendant Board of Realtors, from benefits of the multiple listing system have unlawfully combined, contracted, and/or conspired in restraint of trade, *to wit*, the real estate business, in violation of *N.J.S.A.* 56:9-3.

15. The defendants, by their exclusion of plaintiff and the non-members of defendant Board of Realtors from

the benefits of the multiple listing system, have unlawfully combined or conspired to and/or have monopolized trade and commerce, *to wit*: the real estate business in the Monmouth County area in violation of *N.J.S.A.* 56:9-4.

16. As a result of defendants' unlawful activities in restraining trade and commerce as alleged and in defendants' denying plaintiff access to the listings of available real estate in the Monmouth County area through defendant M.L.S., plaintiff has lost and will constantly lose business and profits and has and will sustain injury to business, profits and livelihood, and is entitled to damage for such injury as well as treble damages, pursuant to *N.J.S.A.* 56:9-12.

17. Upon information and belief, the defendants, unless restrained, will continue their activities alleged above and will wrongfully continue to deny plaintiff listings of available real estate in the Monmouth County area which will prevent plaintiff from pursuing his activity as a real estate broker, will cause plaintiff to lose business, profits and customers, and damage his reputation as a real estate broker, and will drive plaintiff out of business, and, thus, plaintiff is entitled to injunctive relief against the threatened loss of his business through defendants' activities both under the general equity power of the Courts and under the provisions of *N.J.S.A.* 56:9-10.

18. The defendant New Jersey Association of Realtors and the defendant National Association of Realtors are named as necessary parties in that a portion of the dues payable to defendant Boards of Realtors is earmarked for their use and the defendant Boards of Realtors operate under the constitution and by-laws of the National Association of Realtors and New Jersey Association of Realtors.

19. The plaintiff has no other adequate remedy than relief from this Court.

WHEREFORE, plaintiff demands judgment against defendants jointly, severally, or in the alternative,

A. Declaring that Monmouth County Board of Realtors and the Monmouth County Multiple Listing Service an unlawful combination in restraint of trade and/or an unlawful monopoly on the real estate business in Monmouth County.

B. Declaring that the constitution, by-laws, regulations, rules, activities, and practices of the Monmouth County Board of Realtors, and Monmouth County Multiple Listing Service (as well as the National Association of Realtors and New Jersey Association of Realtors, if such relief be deemed necessary) relating to limiting members of the Monmouth County Multiple Listing Service to members of the Monmouth County Board of Realtors and denying others access to the benefits of the multiple listing service an unlawful combination in restraint of trade and contrary to public policy and invalid.

C. Permanently restraining defendants from denying plaintiff membership in the Monmouth County Multiple Listing Service and from denying plaintiff access to the listings of the listings of the Monmouth County Multiple Listing Service.

D. Damages for loss of profits and for injury to his business.

E. Punitive damages.

F. Treble damages in accordance with the provisions of *N.J.S.A.* 57:9-12.

G. Attorneys' fees and costs of the suit.

H. Such other relief as the Court may deem equitable.

ORGAN & STRAWINSKI, Esqs.,
Attorneys for Plaintiff,

By: /s/ Frederick A. Organ
FREDERICK A. ORGAN

CERTIFICATION OF VERIFICATION

I am the plaintiff in the foregoing amended complaint. The allegations of the foregoing amended complaint are true to the best of my knowledge, information, and belief.

I certify that the foregoing statements made by me are true to the best of my knowledge, information, and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Wayne C. Pomanowski
WAYNE C. POMANOWSKI

PRETRIAL MEMORANDUM OF WAYNE C. POMANOWSKI

1. Nature of Action: Action brought under the New Jersey Anti-Trust Act (N.J.S.A. 56:9-1 et seq.) seeking to declare defendants actions in restricting membership in the Monmouth County Multiple Listing Service to members of the Monmouth County Board of Realtors (as well as the State and National Association of Realtors) and*

2. Admissions and Stipulations: None as of filing of this pretrial memorandum.

3-4. Factual and Legal Contentions: (Annexed hereto).

5. Damage and Injury Claims: Plaintiff seeks injunctive relief together with an award for attorney fees. Claim for damages was waived at original hearing of this matter.

6. Amendments: None.

7. Legal Issues and Evidence Problems: See Attached.

8. Legal Issues Abandoned:

9. Exhibits: See Attached.

10. Expert Witnesses: See Attached.

11. Briefs: Pursuant to Court Order submission of Appellate Division and Supreme Court briefs.

12. Order of Opening and Closing: Usual, subject to placement of amicus curiae.

13. Any Other Matters Agreed Upon: None as of date of submission of pretrial memorandum.

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*excluding plaintiff as a non member, a violation of the State Anti-Trust Act.

14. Trial Counsel: Paul V. Strawinski and Frederick A. Organ

15. Estimated Length of Trial: One to two weeks.

16. Weekly Call or Trial Date: Pursuant to Court Order.

17. Attorneys for Parties Conferred on Numerous occasions. Matters Then Agreed Upon: None as of this time.

18. It is hereby certified that all pretrial discovery has been completed. Except Defendants have not answered interrogatories served upon them.

19. Parties Who Have Not Been Served: None.
Parties Who Have Defaulted: None.

ORGAN & STRAWINSKI, ESQS.
ATTORNEYS FOR PLAINTIFF

/s/ Paul V. Strawinski
PAUL V. STRAWINSKI

Dated: October 9, 1979

3. FACTUAL CONTENTIONS

A. Plaintiff was denied access to Monmouth County Multiple Listing Service (MCMLS) because he terminated his membership in the Monmouth County Board of Realtors (MCBR) (as well as the New Jersey and National Association of Realtors).

B. Access to the MCMLS is vital for plaintiff to operate his real estate brokerage business. Access to the MCMLS listings is his stock and trade.

C. The MCMLS controls a great percentage (approaching 80%) of the listings of properties listed for sale in the area of Monmouth County that plaintiff practices in.

D. A great percentage (approaching 90%) of the brokerage firms or agencies in the area where plaintiff practices, belong to and participate in the MCMLS.

E. The MCMLS is the only multiple listing service that operates in the basic geographic area of Monmouth County where plaintiff practices.

F. The MCMLS is not simply a club activity but rather it is an integral part of the real estate business in Monmouth County.

G. A Multiple Listing Service receives listings from members on real estate located in its jurisdictional area and disseminates thes listings to all its members. It allows each listing to reach a wide market and also supplies the members with a large inventory of available properties. It is a cooperative sales device through which real estate may be merchandised efficiently and expeditiously to the greater advantages of sellers, buyers, and participating real estate brokers.

7. LEGAL ISSUES

A. Can membership in a county board of Realtors, even where open to all licensed real estate brokers and salesmen, be made a condition precedent to participation in the board's multiple listing service without offending the New Jersey Antitrust Act NJSA 56:9-1 et seq.?

B. Are the defendants actions, in excluding plaintiff from the MCMLS simply because he is not a member and does not want to be a member of the MCBR, violation of the New Jersey Antitrust Act under the rule of reason test as applied to antitrust cases?

C. If plaintiff prevails, is he entitled to an award of attorney's fees and costs?

8. EVIDENCE PROBLEMS

May the New Jersey Attorney General, Anti-Trust Section, submit their findings as to data and statutes relating to market share and number of brokers controlled by the MCBR and MCMLS?

9. EXHIBITS

A. Data as to Market Share of Monmouth County Multiple Listing Service.

B. Data as to Membership of Monmouth County Multiple Listing Service and Monmouth County Board of Realtors.

C. Records or data of New Jersey Real Estate Commission as to complaints.

D. Comparison of facts of case to other antitrust cases involving access to Multiple Listing Services.

10. EXPERT WITNESSES

A. William Trombetta, D.A.G. or a member of his staff as to data compiled as to Multiple Listing Services.

B. Harold Howard, Esq. of California Bar. Participated in cases involving antitrust issues applied to Multiple Listing Services.

C. Victor Milmed, former member of MCMLS committee.

PRE-TRIAL MEMORANDUM OF NEW JERSEY ATTORNEY GENERAL, AMICUS CURIAE

1. NATURE OF ACTION: This is an action pursuant to *N.J.S.A.* 56:9-3 where the plaintiff seeks access to the Monmouth County Multiple Listing Service. However, as a condition of access to the Multiple Listing Service, the defendant Monmouth County Board of Realtors requires the plaintiff to join the Board of Realtors. The Attorney General of New Jersey seeks to establish that such requirement is an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

2. ADMISSIONS OR STIPULATIONS OF THE PARTIES: At this time, none have been arrived at.

3-4. FACTUAL AND LEGAL CONTENTIONS: See attached.

5. DAMAGE AND INJURY CLAIMS: See Plaintiff's Pre-trial Memorandum.

6. AMENDMENTS: None.

7. LEGAL ISSUES AND EVIDENCE PROBLEMS:

a. Legal Issues: Whether conditioning access to the Monmouth County Multiple Listing Service on joining the Monmouth County Board of Realtors is an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

b. Evidence Problems: The Attorney General will seek to have admitted into evidence data and summaries of data bearing on market share analysis and the validity of defendant's claim that adherence to the Realtor Code of Ethics results in significant inprovement in ethics and competence in the real estate transaction process, particularly with respect to consumers. Specifically,

such data were gathered from New Jersey Real Estate Commission complaint files for the year 1977 (Public Records), New Jersey Department of Taxation data on residential real estate sales by county and town for the years 1975 through 1977 (Public Records), subpoenaed business records from all multiple listing services throughout the State including residential real estate sales data and complaints, grievances and arbitrations for the period 1973 through 1977 (Business Records), residential real estate sales data testified to by executive officers of the multiple listing services throughout the State (Civil Investigative Demands issued in 1979), and 1978 Monmouth County Telephone Book Yellow Pages.

If no objection is made to any such data prior to trial, the same should be admitted without formal foundation proof but subject only to objection as to relevance.

8. LEGAL ISSUES ABANDONED: None.

9. LIST OF EXHIBITS: Subject to the possible evidentiary problems noted in §7b, the Attorney General seeks to introduce the following as exhibits:

a) Market Share accounted for by Monmouth County MLS.

b) Monmouth County MLS Charter indicating its territorial jurisdiction.

c) Information format used to collect data from the New Jersey Real Estate Commission Complaint files for 1977.

d) Total number of New Jersey Real Estate Commission complaints for 1977 apportioned between Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services.

e) New Jersey Real Estate Commission complaints for 1977 broken down by Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services further broken down by whether source of complaint was a licensed real estate person or a consumer.

f) The same format and approach as in §9(d) and (e) but applied to complaints, grievances and arbitrations derived from subpoenaed business records of selected multiple listing services and Realtor Boards as part of the State-wide real estate investigation being conducted by the Attorney General.

g) Complaints resolved from the subpoenaed business records noted in §9(f).

h) Number of real estate brokerage firms doing business in Monmouth County Multiple Listing Service territorial jurisdiction who participate in the Monmouth County Multiple Listing Service.

10. EXPERT TESTIMONY: See Plaintiff's Pre-Trial Memorandum.

11. FILING OF BRIEFS: As directed by the Court.

12. ORDER OF OPENING AND CLOSING: Usual.

13. MATTERS AGREED UPON: None.

14. COUNSEL: William L. Trombetta, Deputy Attorney General.

15. LENGTH OF TRIAL: One day for Amicus Curiae.

16. WEEKLY CALL DATE: As directed by Court.

17. PREVIOUS CONFERENCE DATES: The attorneys have not conferred.

18. DISCOVERY: There may be need for further discovery if the parties cannot agree or stipulate to the

market share accounted for by the Monmouth County Multiple Listing Service, particularly the breakdown of residential real estate sales volume between sales made within the chartered territorial jurisdiction of the Monmouth County Multiple Listing Service and those sales made outside its chartered territorial jurisdiction.

19. DEFAULTING PARTIES AND PARTIES NOT SERVED: The amicus curiae has no knowledge of any parties which have not been served or have defaulted.

3-4. FACTUAL AND LEGAL CONTENTIONS OF AMICUS CURIAE

The New Jersey Real Estate Commission is a regulatory agency and instrumentality of the State of New Jersey within the Department of Insurance. Among the duties and responsibilities of the Real Estate Commission is the licensing of real estate applicants. By precluding brokers and licensed salespersons from the multiple listing service unless they become members of the Monmouth County Board of Realtors, a private trade association, the defendants have pre-empted the Real Estate Commission's duties and responsibilities in regard to who practices real estate and where by precluding qualified licensees from a substantial share of the market.

The Monmouth County Multiple Listing Service is essential to the economic success of most residential real estate brokers operating within the chartered territorial jurisdiction of the Monmouth County Multiple Listing Service. The overwhelming majority of the licensed real estate brokers and the salespersons who work under them operating within the chartered territorial jurisdiction of the Monmouth County Board of Realtors utilize the Monmouth County Multiple Listing Service.

The National Association of Realtors' Code of Ethics proclaims that the Realtor Code of Ethics is designed to

"protect the public against fraud, misrepresentation, or unethical practice" and to eliminate any practices "damaging to the public or to the dignity and integrity of the real estate profession." Therefore, there should be no significant differences between Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services in terms of fraud, competence or ethics between the two groups. In fact, if defendant's argument was accepted one would expect Realtor Board-controlled multiple listing services to exhibit a lower frequency of complaints filed relative to their true strength in the population in terms of dollar value.

The defendant's contention that requiring membership in the Monmouth County Board of Realtors before a broker can gain access to the Monmouth County Multiple Listing Service is protecting the public from fraudulent and unethical brokers is unfounded. Defendant has no *statistical* or *empirical* data to indicate that Monmouth County Board of Realtors members are more ethical or competent than non-members as a group. Defendant offers no more than broad, sweeping platitudes that adherence to the Realtor Code of Ethics should be accepted without question. But antitrust law requires a restraint of trade to be drawn narrowly to accomplish its objective. If the objective is allegedly to improve ethics and competence and empirical data show that the defendant's justification is itself invalid, the condition will be shown for what it really is—a naked attempt to further entrench the power of the Realtor trademark.

Conditioning multiple listing service access on becoming a Realtor is ineffective, at best, in improving ethics and competence, and at worse, clearly more than is necessary to accomplish the objective under a rule of reason analysis. Conditioning multiple listing service access on Realtor board membership is a classic case of

broad restraint of trade being found to have no particular relationship to economic need or ethical conduct.

The possible justification for requiring Realtor-Board membership to use the Monmouth County Multiple Listing Service (including the desire to deal only with qualified personnel, the objective of improving professionalism, the technical argument about dealing only with sub-agents who subscribe to the same ethical standards, the offering of special benefits to realtor members) are insufficient to insulate their anticompetitive economic effects, particularly in light of the restriction's ineffectiveness in achieving its objectives and the availability of less restrictive alternatives. There is no question that because of the amount of the market precluded from the plaintiff by defendants, both in terms of number of brokerage firms belonging to the Realtor Board and dollar volume, that the public interest would be adversely affected to a point where it would be contrary to public policy to condone the unnecessary, invalid and ineffective justification for conditioning access to the multiple listing service upon Realtor Board membership.

The opportunity to *voluntarily* become a Realtor or Realtor-Associate is not contested by any party to this action. However, the forced requirement that a qualified licensee must join a Realtor Board as a condition to gaining access to the multiple listing service should be barred as an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

PRETRIAL ORDER

The parties to this action, by their attorneys, having appeared before the Court at a pretrial conference on the above date, the following action was taken:

1. Action by plf Pomanowski pursuant to NJS 56:9-3, to compel def Monmouth to permit plf to have access to the multiple listing service without joining the county, state or federal board as a condition for such access. The State joins with plf as amicus and the state association joins as amicus with the county association.

2. See no. 1, 2 and 3 of county association's memo.

3. See plf's contentions annexed. 3a. State of N.J. contentions.

4. County Association. 4a. State Association.

5. Not applicable.

6. None.

7. a. Does the requirement that one join and pay for himself together with all his salespersons as a condition precedent for access to the service known as multiple listing violate the "Rule of Reason" as it applies to restraint of trade?

b. What is the market territory of the county association?

c. In the judicial search, should the inquiry be confined to the jurisdictional territory of the Monmouth County Board of Realtors or should the inquiry include the total area of any and all sales that pass through the MLS?

d. What portion of the relevant market is controlled by the def Board?

e. Assuming that the Board does control a significant portion of the market, what is the effect on competition in the same area?

f. What are the defs legitimate, if any, business purposes in requiring any prospective users to join the county and state associations?

g. What benefits, if any, does the general public derive from a requirement by the def that one join the county and state associations as a condition precedent to access to its multiple listing service?

h. Does the de minimus rule apply to def's conduct assuming it does violate anti-trust law?

8. None. 9. None at this time. 10. Three each side.

11. Briefs: Plf 30 days before trial; 20 for state; 15 for def; 10 for state association. Any issue not briefed is deemed abandoned. Any party failing to file brief on time will be sanctioned.

12. Usual. 13. None. 14. Mr. Strawinski for plf; Mr. Trombetta for State of NJ; C.K. Henderson for country association; A.M. Greenbaum for state association.

15. 2 days. 16. Trial date: Feb 20, 1980.

3-4. FACTUAL AND LEGAL CONTENTIONS OF DEFENDANT BOARD

The plaintiff, Wayne Pomanowski, alleges that he is a licensed real estate broker, engaged in the real estate brokerage business under the name of Thomson Agency, located at 43 Gilbert Street North, Tinton Falls, Monmouth County, New Jersey. The defendant Monmouth County Board of Realtors is a non-profit New Jersey Corporation with its principal place of business at 157 Patterson Avenue, Shrewsbury, Monmouth County,

New Jersey. The defendant Monmouth County Multiple Listing Service is a committee of the Monmouth County Board of Realtors and is charged with the day-to-day operation of a multiple listing service owned and operated by the Board. The Monmouth County Board of Realtors is open to all licensed brokers who wish to be members. Board records, which go back seven years, indicate that no broker has been refused membership during that entire period.

Defendant Monmouth County Board of Realtors is a member of the New Jersey Association of Realtors (NJAR) and the National Association of Realtors (NAR). NAR is the owner of the trademark "Realtor" and the Realtor logo. It authorizes local boards such as the Monmouth County Board and its multiple listing service to use these marks. Neither NJAR nor NAR requires a Board to operate a multiple listing system.

The operation of a multiple listing service is just one of a number of important functions performed by the Monmouth County Board of Realtors. In addition to permitting its members to use the trademarks owned by NAR, the Board maintains an ethical code to which its members must adhere. The Board also provides a mechanism for the arbitration of disputes between members, and it offers a forum for the determination of ethics complaints against members.

The Monmouth County Multiple Listing Service is but one of 22 active committees which function under Board auspices. Most Board members participate in the Service, but a number choose not to. The function of the Service, of course, is to provide a facility through which a member who has been retained as an agent to sell real property may solicit other brokers to accept subagencies on defined terms.

Prior to the decision below, participation in the Monmouth County Multiple Listing Service was limited to members of the Monmouth County Board of Realtors. Plaintiff Pomanowski was a member of the Board for a number of years, and during that time he participated in the Multiple Listing Service as well as in many of the other services provided by the Board.

The Board of Realtors has annual dues of $170.00 for each broker and $40.00 per associate. The plaintiff has two sales associates in his office and would therefore have annual dues of $250.00. If he wished to participate in the Board's multiple listing service he would have to pay multiple listing service fees in addition to the $250.00. The plaintiff paid no dues for the year 1977 to the Board of Realtors. Plaintiff had a history of paying his dues late, and it was not initially suspected that he wished to withdraw from Board membership. Accordingly, the plaintiff was carried as a member until April 1st, and repeatedly notified to pay his dues. Since he had not paid his dues at that point, he was dropped from membership. At that time plaintiff had paid for the use of the multiple listing service through March 31, 1977, but had not paid for the second quarter. In other words, he received listings for the full period for which he paid multiple listing service charges. However, for purposes of this case, the defendants concede that membership in the defendant Board was a requirement for participation in the Board-owned and -operated multiple listing service.

Defendant Board of Realtors contends that its requirement of membership as a precondition to access to the Board-owned and -operated multiple listing service does not restrain competition. Defendant Board further contends that even if the requirement is demonstrated to restrain trade, plaintiff cannot demonstrate that the requirement is unreasonable within the meaning of the Antitrust Act. Defendant Board further contends that

the Board's requirement of membership is demonstrably reasonable in light of the Board's motivations, the *de minimus* nature of any restraint which might be found, the Board's business justifications and the promotion of public and consumer interest.

3-4. FACTUAL AND LEGAL CONTENTIONS OF AMICUS CURIAE, NEW JERSEY ATTORNEY GENERAL

The New Jersey Real Estate Commission is a regulatory agency and instrumentality of the State of New Jersey within the Department of Insurance. Among the duties and responsibilities of the Real Estate Commission is the licensing of real estate applicants. By precluding brokers and licensed salespersons from the multiple listing service unless they become members of the Monmouth County Board of Realtors, a private trade association, the defendants have pre-empted the Real Estate Commission's duties and responsibilities in regard to who practices real estate and where by precluding qualified licensees from a substantial share of the market.

The Monmouth County Multiple Listing Services is essential to the economic success of most residential real estate brokers operating within the chartered territorial jurisdiction of the Monmouth County Multiple Listing Service. The overwhelming majority of the licensed real estate brokers and the salespersons who work under them operating within the chartered territorial jurisdiction of the Monmouth County Board of Realtors utilize the Monmouth County Multiple Listing Service.

The National Association of Realtors' Code of Ethics proclaims that the Realtor Code of Ethics is designed to "protect the public against fraud, misrepresentation, or unethical practice" and to eliminate any practices "damaging to the public or to the dignity and integrity of the

real estate profession." Therefore, there should be no significant differences between Realtor Board-controlled multiple listing services and non-Realtor Board-controlled multiple listing services in terms of fraud, competence or ethics between the two groups. In fact, if defendant's argument was accepted one would expect Realtor Board-controlled multiple listing services to exhibit a lower frequency of complaints filed relative to their true strength in the population in terms of dollar volume.

The defendant's contention that requiring membership in the Monmouth County Board of Realtors before a broker can gain access to the Monmouth County Multiple Listing Service is protecting the public from fraudulent and unethical brokers is unfounded. Defendant has no *statistical* or *empirical* data to indicate that Monmouth County Board of Realtor members are more ethical or competent than non-members as a group. Defendant offers no more than broad, sweeping platitudes that adherence to the Realtor Code of Ethics should be accepted without question. But antitrust law requires a restraint of trade to be drawn narrowly to accomplish its objective. If the objective is allegedly to improve ethics and competence and empirical data show that the defendant's justification is itself invalid, the condition will be shown for what it really is—a naked attempt to further entrench the power of the Realtor trademark.

Conditioning multiple listing service access on becoming a Realtor is ineffective, at best, in improving ethics and competence, and at worse, clearly more than is necessary to accomplish the objective under a rule of reason analysis. Conditioning multiple listing service access on Realtor board membership is a classic case of broad restraint of trade being found to have no particular relation to economic need or ethical conduct.

The possible justifications for requiring Realtor-Board membership to use the Monmouth County Multiple Listing Service (including the desire to deal only with qualified personnel, the objective of improving professionalism, the technical argument about dealing only with sub-agents who subscribe to the same ethical standards, the offering of special benefits to realtor members) are insufficient to insulate their anticompetitive economic effects, particularly in light of the restriction's ineffectiveness in achieving its objectives and the availability of less restrictive alternatives. There is no question that because of the amount of the market precluded from the plaintiff by defendants, both in terms of number of brokerage firms belonging to the Realtor Board and dollar volume, that the public interest would be adversely affected to a point where it would be contrary to public policy to condone the unnecessary, invalid and ineffective justification for conditioning access to the multiple listing service upon Realtor Board membership.

The opportunity to *voluntarily* become a Realtor or Realtor-Associate is not contested by any party to this action. However, the forced requirement that a qualified licensee must join a Realtor Board as a condition to gaining access to the multiple listing service should be barred as an unreasonable restraint of trade under *N.J.S.A.* 56:9-3.

3.-4. FACTURAL AND LEGAL CONTENTIONS OF AMICUS CURIAE, NEW JERSEY ASSOCIATION OF REALTORS

The New Jersey Association of Realtors (hereinafter "NJAR") represents some 16,000 licensed real estate brokers and salespersons in all twenty-one counties of this State. The Association is divided into districts, which in

turn are divided into regional boards. The defendant, Monmouth County Board of Realtors (hereinafter "Board"), represents a regional, or county, branch of the State Association.

Through membership in NJAR, the Board is licensed to use the trademark "Realtor" which is owned by the National Association of Realtors. The Board is open to all licensed brokers who wish to be members.

The defendant, Monmouth County Multiple Listing Service, is a committee of the Board and is charged with the day-to-day operation of a multiple listing service owned and operated by the Board. As a committee of the Board, it is authorized to utilize the trademark "MLS" which is also owned by the National Association of Realtors. Neither NJAR nor the National Association has any rule or regulation which requires the Board to operate a multiple listing service.

Membership in the defendant Board was a requirement for participation in the Board owned and operated multiple listing service. Plaintiff contends that this is an unreasonable restraint of trade in violation of the New Jersey Antitrust Act, *N.J.S.A.* 56:9-1, *et seq.*

In assisting the Court in its application of the "rule of reason" to the facts of this matter, the *amicus curiae* contends that there is a rational and legitimate nexus between the Multiple Listing Service that the county, state and national Realtor organizations. The trademarks "Realtor" and "MLS" which are used by Board members have come to be associated in the mind of the public with the knowledgeable, efficient and honest handling of real estate transactions. Board membership requires adherence to a Code of Ethics, and a procedure at the local level for the determination of ethics complaints against members, as well as a mechanism for the arbitration of disputes among members. Furthermore, NJAR

provides counsel and advice to the local Boards, concerning problems affecting the profession, some of which pertains directly to the operation of multiple listing services.

All of the foregoing attributes of Board membership redounds to the benefit of the public and provides assurance that negotiations and dealings will be carried out according to certain will-defined ethical and professional standards. Board membership bears a reasonable relationship to participation in the service, such that the public interest would be adversely affected if the requirement of membership were to be eliminated. The plaintiff has not been excluded from such membership and has not demonstrated economic hardship as a result of the membership requirment. Accordingly, the *amicus curiae*, in the exercise of its advisory function, will take the position that the Board's operation of the Monmouth County Multiple Listing Service does not violate *N.J.S.A.* 56:9-1, *et seq.*

3. FACTUAL CONTENTIONS OF PLAINTIFF POMANOWSKI

A. Plaintiff was denied access to Monmouth County Multiple Listing Service (MCMLS) because he terminated his membership in the Monmouth County Board of Realtors (MCBR) (as well as the New Jersey and National Association of Realtors).

B. Access to the MCMLS is vital for plaintiff to operate his real estate brokerage business. Access to the MCMLS listings is his stock and trade.

C. The MCMLS controls a great percentage (approaching 80%) of the listing of properties listed for sale

in the area of Monmouth County that plaintiff practices in.

D. A great percentage (approaching 90%) of the brokerage firms or agencies in the area where plaintiff practices, belong to and participate in the MCMLS.

E. The MCMLS is the only multiple listing service that operates in the basic geographic area of Monmouth County where plaintiff practices.

F. The MCMLS is not simply a club activity but rather it is an integral part of the real estate business in Monmouth County.

G. A Multiple Listing Service receives listings from members on real estate located in its jurisdictional area and disseminates these listings to all its members. It allows each listing to reach a wide market and also supplies the members with a large inventory of available properties. It is a cooperative sales device through which real estate may be merchandised efficiently and expeditiously to the greater advantages of sellers, buyers, and participating real estate brokers.

H. That membership in and access to the MCMLS is limited to members of the MCBR (as well as the state and national Realtor Associations).

I. There are some multiple listing services in New Jersey which are not run by the Realtor Organizations and or do not require Realtor Membershp. These multiple listing services are:

Bergen County MLS
Central Bergen MLS
Eastern Bergen MLS
Pascack Valley MLS
West Essex MLS (Realtor run
but membership not required)

Realty MLS (Hudson and surrounding area)
Middlesex County MLS (Realtor run
but membership not required)
Passaic County MLS (Realtor run
but membership not required)
MLS of Union County (Realtor run
but membership not required)
MLS, Inc. of Plainfield

J. The fees collected for the MCMLS are to pay for the costs of the MCMLS and are separate from fees and costs of the MCBR.

K. Plaintiff if excluded from the MCMLS, would loose his access to numerous listings; would loose cooperation with other brokers; would loose clients because they will go to participating brokers and would have a difficult time obtaining salespersons to work with him.

L. The defendants actions tend to limit entry into a competetive field by making it difficult for non-members to compete effectively with members of the MCMLS and MCBR. It also narrows choice of consumers as to which broker to deal with. The defendants actions have a deleterious effect on both the competitors and consumers.

4. LEGAL CONTENTIONS OF PLAINTIFF POMANOWSKI

A. The defendants, by excluding plaintiff, as well as others, from the MCMLS simply because they are members of the MCBR (as well as the State and National Realtor Associations) is in violation of the New Jersey Antitrust Act.

B. There is no rational or legal basis for the requirement of the Realtor Membership to gain access to the MCMLS.

C. Should plaintiff prevail, he is entitled to an award for attorney's fees and costs for the entire court action.

D. The MCBR and Realtor Associations are not free to exclude non-members from its multiple listing service.

E. Exclusion of non-Realtor members from the MCMLS is an anti-competitive practice without a rational basis.

F. The defendants are not exempt from the provisions of the New Jersey Antitrust Statute as applied in this case.

G. The defendants actions in excluding non-Realtor members from the MCMLS violate the New Jersey Antitrust Act under the rule of reason test.

IN THE

Superior Court of New Jersey

CHANCERY DIVISION-MONMOUTH COUNTY

DOCKET No. C-3479-76

WAYNE C. POMANOWSKI,

Plaintiff

vs.

MONMOUTH COUNTY BOARD OF REALTORS, A New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE.

Defendants.

CIVIL ACTION

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Defendants.

CIVIL ACTION

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IN THE

Superior Court of New Jersey

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DOCKET NO. A-190-80-T3

WAYNE C. POMANOWSKI,

Plaintiff,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, a New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE.

Defendants.

CIVIL ACTION—ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION-MONMOUTH COUNTY/ SAT BELOW: HON. THOMAS L. YACCARINO, J.S.C.

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Plaintiff-Respondent,

vs.

MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOUTH COUNTY MULTIPLE LISTING SERVICE.

Defendants-Appellants.

CIVIL ACTION—ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION-MONMOUTH COUNTY

SAT BELOW: HON. THOMAS L. YACCARINO, J.S.C.

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